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CRIMINAL LAW ISSUES

HENDRIX v. STATE, No. 57S00-0008-CR-509, ___ N.E.2d ___ (Ind. Dec. 20, 2001).
SULLIVAN, J.

Certain classes of criminals will meet the requirements of both the habitual offender statute and the habitual substance offender statute. The habitual offender statute includes people who have been convicted of three separate felonies. The habitual substance offender statute includes people who have been convicted of three substance offense convictions. An individual who is convicted of three felony substance abuse convictions will, by definition, meet the criteria for both statutes.

We have previously held that where two criminal statutes overlap such that both are appropriate under the circumstances, the prosecutor has the discretion to charge under either statute. See Skinner v. State, 736 N.E.2d 1222, 1222 (Ind. 2000). We hold that this principle applies in the habitual offender context as well. Where a defendant could be prosecuted under either the habitual offender statute or the habitual substance offender statute, the prosecutor has discretion to choose either statute.

. . . .

Indiana Code § 35-50-2-8(e) states that the court shall sentence a habitual offender "to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense." It follows that if the underlying offense is a Class A felony, the trial court would be required to impose an additional 30 years because the presumptive sentence for a Class A felony is 30 years. See I.C. §§ 35-50-2-8, 35-50-2-4. If the underlying offense is a Class B felony however, the additional sentence could be anywhere from 10 to 30 years because the presumptive sentence for a Class B felony is ten years. See I.C. §§35-50-2-8 and 35-50-2-5.

While the statute controls the range of the enhancement, it does not require that the trial court attach the enhancement to the most severe underlying felony. Where a habitual offender proceeding follows multiple felony convictions, the jury finding of habitual offender status is not linked to any particular conviction. [Citation omitted.] The trial court therefore has discretion to choose which sentence to enhance. See Winn v. State, 748 N.E.2d 352, 360 (Ind. 2001) (trial court could have imposed habitual offender enhancement on one of the Class A or Class D felonies of which the defendant was convicted).

The trial court in this case erred when it concluded that it did not have the discretion to enhance either felony. The enhancement of the Class A felony resulted in a total sentence of 60 years. It was within the trial court's discretion to enhance the Class B felony, but the trial court did not consider that alternative. . . .

We are unable to ascertain from the record whether the trial court would have imposed

a lesser sentence had it understood that it could do so. We therefore remand the case to the trial court for re-sentencing. In doing so, the trial court must choose which felony sentence to enhance.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, And RUCKER, JJ., concurred.

HOPKINS v. STATE, No. 49S00-0011-CR-617, ___ N.E.2d ___ (Ind. Dec. 20, 2001).

SULLIVAN, J.

Because of the stringent penalties for attempted murder and the ambiguity often involved in its proof, this court has singled out attempted murder for special treatment. See Richeson vs. State, 704 N.E.2d 1008 (Ind. 1998). First, a conviction for attempted murder requires proof of specific intent to kill. Spradlin v. State, 569 N.E.2d 948, 950 (Ind.1991). And where, as here, the State seeks a conviction for attempted murder on an accomplice liability theory, we have held that its burden of proof is as follows:

> (1) that the accomplice, acting with the specific intent to kill, took a substantial step toward the commission of murder, and
>
> (2) that the defendant, acting with the specific intent that the killing occur, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder.

Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000).

The trial court gave the following instructions on accomplice liability. Instruction 10: "You are instructed that when two or more persons combine to commit a crime, each is criminally responsible for the acts of his confederate(s) committed in furtherance of the common design, the act of one being the act of all." Instruction 11 read:

> A person is responsible for the actions of another person when, either before or during the commission of a crime, he knowingly aids, induces, or causes the other person to commit a crime. To aid is to knowingly support, help, or assist in the commission of a crime.
>
> In order to be held responsible for the action of another, he need only have knowledge that he is helping in the commission of a crime. He does not have to personally participate in the commission of each element of a crime.
>
> Proof of the Defendant's failure to oppose the commission of a crime, presence at the crime scene, companionship with the person committing the offense, and conduct before and after the offense may be considered in determining whether aiding may be inferred.

[Citation to Record omitted.]

Here, the trial court failed to instruct the jury regarding specific intent required of Defendant to establish accomplice liability for attempted murder. However, Defendant did not object and did not tender a correct instruction. . . . In such circumstances, we will only reverse the trial court if the trial court committed error that was fundamental. [Citation omitted.] . . .

. . . One particular circumstance where we have found a Spradlin error not to constitute fundamental error is where the Defendant's intent was not at issue. . . .

. . . [W]e find that the trial court clearly erred by failing to instruct the jury on the specific intent necessary to establish accomplice liability for attempted murder. . . .

. . . .

We agree with the State that it presented sufficient evidence at trial from which a jury could conclude that Defendant was guilty of attempted murder Defendant participated in ordering both victims to the basement, ordering them to strip, and taking their cash. He handed his brother a handgun while he went upstairs to ransack the house for drugs and/or money. His brother then, without any new conduct or provocation from either victim, simply pointed the handgun at Martinez's head and shot him. When Defendant returned to the

basement, where Martinez was lying on the floor apparently dead, his brother handed him back the handgun, and Defendant proceeded without saying anything, and without any new conduct or provocation from McCarty, to fire the handgun at her face from three feet away. These circumstances are sufficient to permit a jury to infer beyond a reasonable doubt that Defendant intended that his brother kill Martinez, and aided him in the crime.

But because Defendant's intent to kill Martinez was squarely at issue and because the jury was not properly instructed that it was required to find beyond a reasonable doubt that Defendant possessed the specific intent to kill Martinez, we are unable to affirm the trial court's judgment on this count. . . .

. . . .

Under the instruction and the evidence presented, the jury theoretically could have found that the offense of criminal confinement was committed either (1) when Martinez and McCarty were forced at gunpoint to go from the kitchen to the basement, (2) when they were forced at gunpoint to remove their clothes, (3) when they were forced at gunpoint to hand over money, or (4) when they were thereafter confined in the basement while the house was being searched. It is only the third of these three events (where the same evidentiary facts establish both robbery and criminal confinement) that implicates the Richardson actual evidence test. However, double jeopardy under this test will be found only when it is reasonably possible that the jury used the same evidence to establish two offenses, not when that possibility is speculative or remote. [Citation omitted.] . . .

Considering the protracted nature of the criminal episode, and particularly the completed offense of criminal confinement as to each victim when they were initially ordered at gunpoint into the basement, we find no sufficient substantial likelihood that the jury based its determination of guilt on the confinement counts upon the evidence of the incidental confinement at the moment of the robbery.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, And RUCKER, JJ., concurred.

CIVIL ISSUE

SHOLES v. SHOLES, No. 27S02-0112-CV-655, ____ N.E.2d ___ (Ind., Dec. 21, 2001).
BOEHM, J.

We grant transfer in this civil appeal to determine whether Indiana Code section 34-10-1-2 requires appointment of counsel for civil litigants who are without "sufficient means to prosecute or defend an action." We hold: (1) appointment of counsel under the statute is mandatory; (2) counsel appointed under the statute must be compensated; and (3) Indiana Trial Rule 60.5 gives trial courts the power to order payment of appointed counsel, but (4) the same considerations governing other court-mandated funding apply in determining whether mandate is appropriate, and (5) counsel for whom mandate of compensation is not appropriate under Trial Rule 60.5 cannot constitutionally be appointed under the statute. In sum, in ruling on an application for appointed counsel in a civil case, the trial court must determine whether the applicant is indigent, and whether the applicant, even if indigent, has means to prosecute or defend the case. If those criteria are met, and there is no funding source or volunteer counsel, the court must determine whether the mandate of expenditure of public funds is appropriate in that case.

. . . .

We agree with the Court of Appeals that the statute does not confer discretion on the trial court to deny counsel. And, as explained below, amici are correct that the Indiana Constitution requires that appointed counsel be compensated. However, in the absence of any legislatively prescribed source of funding, a court's ability to direct that counsel be appointed is circumscribed by the doctrines surrounding the court's ability to order the

expenditure of public funds. Ultimately, then, the decision to appoint counsel for an indigent litigant in a civil case turns on the court's assessment of the nature of the case, the genuineness of the issues, and any other factors that bear on the wisdom of mandating public funds for that purpose.

I. Indiana Code Section 34-10-1-2 Requires Appointment of Counsel

The Court of Appeals concluded that the legislature, by failing to amend section 34-10-1-2 in light of *Holmes v. Jones,* 719 N.E.2d 843 (Ind.Ct.App.1999), has approved of *Holmes'* holding that the unambiguous language of the statute requires appointment of counsel. *Sholes,* 732 N.E.2d at 1253. David argues that legislative acquiescence analysis is unnecessary to the Court of Appeals' holding because the legislature has already expressed its intent in the original enactment of section 34-10-1-2. We think David is essentially correct. . . .

We reach this conclusion on the basis of the statute, not on any notion of legislative acquiescence. As the Court of Appeals noted, the legislature, in 2000, "not only had [the] opportunity to address [the *Holmes* decision] but in three separate bills did so ." *Sholes,* 732 N.E.2d at 1253. [Footnote omitted.] A gridlock in a single session resulting in the failure of these different approaches to amending the statute is not a firm indication of legislative directive. The United States Supreme Court recently observed that failed legislative proposals are a dangerous ground on which to rest statutory interpretations "because a bill can be proposed or rejected for any number of reasons." *Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 160 (2001). We have found longstanding and repetitive legislative inaction to be significant, *Durham ex rel. Estate of Wade v. U-Haul Int'l,* 745 N.E.2d 755, 759 (Ind.2001), but rarely, if ever, is that acquiescence found in a single legislative session's failure to act to overturn a recent decision.

After the Court of Appeals issued its decision in this case, the 2001 session of the General Assembly again addressed section 34-10-1-2. Senate Bill 104, as introduced, would simply have repealed both sections 34-10-1-1 and 34- 10-1-2. Ultimately, both houses appeared to agree on discretionary rather than mandatory appointment of counsel. However, the houses failed to reach agreement on the means of funding appointed counsel. The conference committee then recommended repealing the sections. However, the session expired without action on the conference committee report, leaving the statute again unscathed.

This history is of some interest, because the conference committee report included a "synopsis" of the committee's recommendation, which describes the proposal to repeal the statute as eliminating "the general duty of a county to provide an attorney to an indigent person involved in civil litigation." This seems to reflect the understanding of the General Assembly that section 34-10-1-2, as it stands today, imposes a mandatory duty of appointment on courts if an indigent applicant is without sufficient means to prosecute or defend a civil action. Although both houses appeared to desire a change in the statute, amendatory legislation died in the last days of a difficult session despite the conference committee's agreement. We cannot construe this history as either a legislative acquiescence in the *Holmes* holding or a rejection of the view that the statute is to be read literally. This leaves us where it found us: "shall" means shall.

. . . .

II. Statutory Procedure for Appointment of Counsel

The procedure for the trial court to determine when counsel must be appointed is: (1) the litigant is to apply to the trial court for leave to proceed "as an indigent person"; and (2) if the trial court finds that the applicant is both indigent and without sufficient means to prosecute or defend the action, the trial court shall appoint counsel for the applicant.

Section 34-10-1-1 places the burden upon the party seeking to proceed "as an indigent person" to demonstrate that he or she is indigent and without "sufficient means." However, section 34-10-1-2 does not require the applicant to make an independent, formal request for appointed counsel. Rather, once the trial court finds that the applicant is indigent and without "sufficient means to prosecute or defend" the action, it must sua sponte appoint counsel. Though the considerations of indigence and "sufficient means" are similar in some situations, they are not identical. [Footnote omitted.]

A. *Indigence*

> In *Moore v. State,* 273 Ind. 3, 7, 401 N.E.2d 676, 678-79 (1980), this Court discussed at length several factors to be considered when determining whether a party is indigent:
>
> First, it appears clear that the defendant does not have to be totally without means to be entitled to counsel....
>
> The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations.

B. *Sufficient Means to Prosecute or Defend*

Whether the applicant has "sufficient means" goes beyond a mere snapshot of the applicant's financial status. Rather, the court must examine the applicant's status in relation to the type of action before it. *Cf. Campbell,* 605 N.E.2d at 159 ("[T]he standard governing a finding of indigency is closely related to the purpose for which the status is sought."). If the action is of the kind that is often handled by persons of means without counsel, the court may find that even an indigent applicant has "sufficient means" to proceed without appointed counsel. For example, many forms of small claims actions are typically prosecuted and defended pro se even by persons of means. Similarly, cases that have their own ability to fund counsel are another general category where appointed counsel may be inappropriate. The marketplace for lawyer services can value cases often handled on a contingent fee basis. The same is true of litigation governed by fee shifting statutes. In these cases, an indigent may well be found to have sufficient means to prosecute or defend the action.

We do not mean to create blanket categories of cases in which counsel should never be appointed. Rather, the court should look to the particular issues presented in the action and make a determination of whether the indigent applicant requires appointed counsel. A routine landlord-tenant dispute may present such straightforward issues that the ordinary litigant requires no counsel. In such a dispute, the indigent applicant has "sufficient means" to prosecute or defend the action without appointed counsel. On the other hand, the same dispute might present complexities or involve such significant precedent that proceeding pro se would disadvantage the ordinary litigant, and appointed counsel may be appropriate.

III. Appointed Counsel Must Be Compensated

. . . .

An attorney may of course choose to accept an appointment without compensation. But if no volunteer attorney is available, Article I, Section 21 of the Indiana Constitution provides that "[n]o person's particular services shall be demanded, without just

compensation." We find no support for the proposition that attorneys' services were historically viewed as somehow outside the ban on conscripting "particular services." . . .

Over a century ago, *Pollard* expressed this Court's confidence in the bar's willingness to supply service on a voluntary basis. We continue to share the hope that a number of attorneys will voluntarily accept the appointments required by section 34-10-1-2, but we do not adhere to the view that volunteer resources are sufficient to the task. Pro bono commissions and pro bono service providers are now in place to address this need, but every indication is that they cannot realistically be expected to provide counsel for every litigant. As amicus Indiana Civil Liberties Union put it, "[T]here is no doubt that even including the possibility of pro bono representation, ... existing providers cannot come close to meeting the need for civil legal assistance for indigent litigants." Nor can we rely solely on the philanthropic spirit of the bar to guarantee the proper implementation of the legislature's mandate.

. . . .

IV. Payment from Public Funds

For the foregoing reasons, if section 34-10-1-2 sought to impose service without a fee, that section would be unconstitutional. However, the terms of section 34-10-1-2 do not require an attorney to serve without compensation. Section 34-10-1-2 denies the appointed attorney a "fee or reward from the indigent person." Ind.Code § 34-10-1-2 (1998). There is no statutory prohibition disallowing payment to the appointed attorney from other sources. Although the Court in *Pollard* concluded that no mechanism existed for courts to order payment of the appointed civil attorney by the county, it has since been firmly established that courts have "the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of its duties." *Knox County Council v. State ex rel. McCormick,* 217 Ind. 493, 511, 29 N.E.2d 405, 413 (1940) (citation omitted). This authority includes the power "to appoint and require payment of such personnel as the functions of the court may require." *Noble County Council v. State ex rel. Fifer,* 234 Ind. 172, 187, 125 N.E.2d 709, 717 (1955).

Today, the source of that power is found in Indiana Trial Rule 60 .5. That rule sets forth the procedure by which courts may seek funds "which are reasonably necessary for the operation of the court or court-related functions." Ind. Trial Rule 60.5. [Footnote omitted.] [Citations omitted.]

If counsel is required to be appointed, the payment of counsel becomes a "reasonably necessary" court-related cost, imposed as a result of the legislature's directive. However, the legislative directive to appoint counsel is only one of several factors that a trial court must weigh before requiring payment of appointed counsel under Trial Rule 60.5. . . .

An order to pay funds should not be issued by a trial court if "any specific fiscal or other governmental interests [would be] severely and adversely affected by the payment." *In re Court Reporter Salaries in Knox Circuit and Superior Courts,* 713 N.E.2d 280, 282 (Ind.1999). In the context of appointed counsel for criminal defendants, any governmental or fiscal consequences of paying the counsel are necessarily trumped by the constitutional requirements that (1) counsel be appointed and (2) counsel be compensated for the work. . . .

In most civil cases, however, we have only a statutory directive, and there is no constitutional requirement that counsel be appointed for indigent litigants. As explained in Part II, before appointing counsel, the trial court is to consider the type of case presented to determine whether even an indigent applicant has "sufficient means" to proceed without appointed counsel. In addition, the trial court is obliged to consider whether any specific fiscal or other governmental interests would be severely and adversely affected by a Trial Rule 60.5 order requiring payment of any appointed counsel.

Christine is correct that appointment in some cases is, to use her word, "absurd."

Although most lawsuits represent genuine disputes, some litigants present wholly frivolous cases. Others pursue cases where the amount of money or principles of law are insignificant. Courts are occasionally presented with vendettas and simple sporting exercises. Public funding of counsel in those cases is a waste of public funds. But apart from the amount of public waste involved, appointment of counsel at public expense would severely impair the credibility of the judicial branch. Although the legislature directs appointment of counsel, apparently on the mistaken assumption that attorneys could be required to "do their duty," the appointment and attendant mandate of funds are judicial functions reserved to the courts. As this Court recently observed, "[I]t has been held in a variety of contexts that the legislature cannot interfere with the discharge of judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business." *State v. Monfort,* 723 N.E.2d 407, 411 (Ind.2000). The ultimate credibility of the judicial process must be considered in any exercise of judicial power. Rule 60.5 calls for exercise of judicial judgment, and that judgment cannot be directed by another branch of government consistent with the separation of powers required by Article III of the Indiana Constitution. If no uncompensated attorney is willing to serve and the trial court finds itself unable to order payment, then, for the reasons set forth in Part III, the statutory obligation to appoint counsel fails as an unconstitutional order to attorneys to work without compensation.

V. Sholes' Request for Appointed Counsel

After the trial court entered a decree of dissolution and distributed Christine and David's marital property, David filed two motions "to proceed as pauper." No determination of either appears in the record. However, confronted with such a motion, the trial court should have determined whether David was indigent and without sufficient means to litigate the dissolution action. An affirmative finding on both questions would result in a statutory mandate that counsel be appointed to David. It is for the trial court to determine whether David has a colorable bona fide dispute over issues warranting the expense of counsel. At that point, if no pro bono service provider is available, the trial court would have to consider whether it has the power, under Trial Rule 60.5, to order payment of counsel, or whether the statutory mandate of section 34-10-1-2 fails in light of overriding considerations that would prevent expenditure of public funds for appointed counsel.

Therefore, we remand with instructions (1) to vacate all proceedings conducted after David's February 19, 1999 "Motion to Proceed as Pauper," (2) determine whether David is indigent and without sufficient means, and (3) if so, determine whether counsel may be appointed consistent with Trial Rule 60.5.

VI. Conclusion

We grant transfer and reverse and remand to the trial court for proceedings consistent with this opinion.

SHEPARD, C.J., and SULLIVAN, and RUCKER, JJ., concur.

DICKSON, Justice, concurring and dissenting.

I agree with the majority's position in parts I (finding that Ind.Code § 34-10-1-2 requires appointment of counsel) and II (regarding the procedure for the appointment of counsel under Ind.Code § 34-10-1-1 and § 34-10-1-2). However, I respectfully dissent from part III of the majority's opinion, which holds that counsel appointed under these provisions must be compensated. I also disagree with section IV of the majority's opinion to the extent that it relies on the majority's holding in section III.

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